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JKT PETROLEUM SDN BHD & ORS v. T & O RESOURCES SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
HARMINDAR SINGH DHALIWAL J
[CIVIL APPEAL NO: 12BNCC-57-10-2014]
6 MAY 2015

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CONTRACT: *Agreement – Loan agreement – Claim against borrower and guarantors – Appeal against decision of Sessions Court – Whether borrower received loan amount – Whether there was consideration – Allegation that loan agreement was signed by non-director – Whether there was resolution of board of directors of company to approve and validate loan agreement – Whether claim proved on balance of probabilities – Turquand's rule*

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In the Sessions Court, the respondent ('the plaintiff') claimed against the appellants ('the defendants') for the sum of RM300,000 ('the loan amount') being the loan amount given to the first defendant under an agreement ('the said loan agreement') guaranteed by the other three defendants. The defendants argued that (i) the loan amount had never been given to the defendants and at law, this was a failure of consideration; (ii) the said loan agreement was not valid as it was signed by the third defendant when he was no longer a director of the first defendant; and (iii) the said loan agreement was not valid as there was no resolution by the board of directors of the first defendant to approve and validate the loan agreement. Satisfied that the plaintiff had proved its case on a balance of probabilities, the Sessions Court Judge ('SCJ') allowed the plaintiff's claim. Hence, the present appeal. The same arguments were canvassed on appeal with the contention that the SCJ was erroneous in her findings.

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Held (dismissing appeal):

(1) There was evidence of a sum of RM235,944.10 having been banked in by the plaintiff into the first defendant's bank account. Five bank-in slips of cash deposits into the first defendant's bank account were produced into evidence. The defendants overlooked some compelling evidence, particularly the acknowledgment of receipt of the loan in the said loan agreement itself. This was no different from a receipt of payment usually tendered upon payment in ordinary business transactions. The defendants failed to provide any explanation as to why they have signed the agreement where receipt of the loan was duly admitted by them. The contention that there was no consideration was without merit and could not be sustained. (paras 6, 7, 8 & 14)

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(2) The facts showed that the third defendant was a director at all material times except at the point of time when the said loan agreement was signed by him. The plaintiff had acted in good faith and had no notice or no ground to think that the said director was no longer a director and

was acting without authority. The presence of the company seal and the signature of the other director with authority only lend credence to the assertion that the first defendant had all along intended to be bound by the said loan arrangement and it was only now they faced legal action that this assertion was raised. (para 23)

(3) The rule in *Royal British Bank v. Turquand* ('the *Turquand*'s rule') stipulated that persons dealing with a company in good faith are entitled to assume that acts within its constitution and powers have been properly and duly performed and are not bound to enquire whether acts of internal management have been regular. The plaintiff was entitled to the benefit of the *Turquand*'s rule and the defendant's plea of invalidity of the said loan agreement could not succeed. It would not promote business convenience and certainty if an outsider like the plaintiff here had a duty to ascertain whether the first company had passed a resolution to enter the said loan agreement. Companies which later find difficulty in keeping to the bargain might willy-nilly extricate themselves out of such arrangements by citing non-compliance with its internal procedures. (paras 17 & 20)

Case(s) referred to:
Bank Utama (M) Bhd v. Ihsan Budi Sdn Bhd [2009] 1 CLJ 221 CA ***(refd)***
CB Liggett (Liverpool) Ltd v. Barclays Bank Ltd [1928] 1 KB 48 ***(refd)***
Castle Inn Sdn Bhd v. Bumiputra-Commerce Bank Bhd [2009] 2 CLJ 445 CA ***(refd)***
Morris v. Kanssen & Ors [1946] AC 459 ***(refd)***
Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors [1998] 1 CLJ 793 FC ***(refd)***
Royal British Bank v. Turquand [1856] 119 ER 886 ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 108(1), 127, 165(4)

For the appellants/defendants - A Onn; M/s Onn & Partners
For the respondent/plaintiff - CH Loh (TH Yeoh with him); M/s Stanley Chang & Partners

[Appeal from Sessions Court, Kuala Lumpur; Civil Suit No: A52NCC-933-03-2014]

Reported by Najib Tamby

JUDGMENT

Harmindar Singh Dhaliwal J:

[1] This is an appeal against the decision of the Sessions Court Kuala Lumpur given on 30 September 2014. After a full trial, the Sessions Court allowed the plaintiff's claim with costs against the first, third and fourth defendants. Judgment in default had earlier been obtained against the second defendant. The first, third and the fourth defendants are now appealing against that decision. For convenience, the parties will be referred to as they were in the Sessions Court.

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Brief Facts And Issues

[2] The plaintiff's claim against the defendants was for the sum of RM300,000 being the loan amount given to the first defendant under an agreement dated 10 July 2008 ("the said loan agreement"). The other three defendants were guarantors to the said loan pursuant to a corporate guarantee given by the second defendant and individual guarantees by the third and fourth defendants all dated 10 July 2008. Despite demands by the plaintiff, no repayments were made on the loan.

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[3] At the end of the trial, several issues were raised by the defendants. The main issues can be summarised as follows:

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a) The loan amount of RM300,000 had never been given to the defendants and at law, this was a failure of consideration;

b) The said loan agreement was not valid as it was signed by the third defendant when he was no longer a director of the first defendant as at 10 July 2008; and

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c) The said loan agreement was not valid as there was no resolution by the board of directors of the first defendant to approve and validate the loan agreement.

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[4] The learned Sessions Judge at the end of the trial was however satisfied that the plaintiff had proved its case on a balance of probabilities and the claim of the plaintiff was allowed with costs according to the scale. The same issues are now canvassed on appeal with the contention that the learned Sessions Judge was erroneous in her findings. For ease of reference, the issues raised can really be divided into two; the issue of lack of consideration and the issue of validity of the loan agreement.

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Lack Of Consideration

[5] The defendants' complaint was that the sum of RM300,000 as set out in the said loan agreement was never paid by the plaintiff and never received by the first defendant. It was submitted at length that the plaintiff had failed to prove at the trial that the said sum had indeed been paid and the decision of the learned Sessions Judge was not based on the evidence.

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[6] With regard to the loan sum, despite assertions to the contrary, there was evidence of a sum of RM235,944.10 having been banked in by the plaintiff into the first defendant's bank account. Five bank in slips of cash deposits into the first defendant's Maybank Account No: 502175000958 were produced into evidence and duly considered by the learned judge. There were nevertheless other payments such as consultant fee of RM19,110, commission of RM2,730, advancement of RM25,000.00, balance of debt of RM15,780 and legal fees of RM5,335.90 which were the subject of much criticism by the defendants. The defendants claimed that these claims were

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based on bare assertions by SP1 who gave evidence on behalf of the plaintiff. They claim that no other evidence was led as to how these payments were incurred.

[7] Be that as it may, the defendants appear to have overlooked some compelling evidence which the learned judge correctly observed. What stands out is the acknowledgement of receipt of the loan in the said loan agreement itself. Clause 1.1 of the loan agreement (exh. P1) states:

> The Borrower has requested and the Lender has agreed to grant the said Loan to the Borrower (the receipt of which the Borrower hereby acknowledges) subject to the Borrower repaying the said Loan to the Lender upon the terms and conditions hereinafter contained.

[8] Contrary to the interpretation suggested by the defendants that the said clause does not mean that the loan sum has already been disbursed, to my mind, the words "the receipt of which the borrower hereby acknowledges" is plain enough in that the defendants as borrowers have admitted receipt of the loan. In the absence of any assertion of fraud, misrepresentation or other impropriety on the part of the plaintiff, the first defendant is no position to renege from this admission. In my view, this is no different from a receipt of payment usually tendered upon payment in ordinary business transactions. The defendants have failed to provide any explanation as to why they have signed the agreement where receipt of the loan was duly admitted by them. Unless there was an allegation of fraud or misrepresentation or similar impropriety on the part of the plaintiff, this alone is sufficient to prove that the loan was disbursed by the plaintiff to the first defendant.

[9] The learned judge also quite rightly observed that the said loan of RM300,000 was an unsatisfied debt to the plaintiff as reflected in the annual returns of the first defendant company for the years 2011, 2012 and 2013. This requirement of a company having to make annual returns is mandated by s. 165 of the Companies Act 1965 and failure to do so amounts to a penal offence. The first defendant's explanation that they did not receive any audit confirmation or reminders for payment is unconvincing given that such returns have to be signed by the director or manager or secretary of the company as provided in s. 165(4) of the Companies Act 1965.

[10] Another admission unanswered by the defendants is the Suruhanjaya Syarikat Malaysia ("SSM") search report dated 11 March 2014 pertaining to the first defendant company. This search disclosed company charges unsatisfied by the first defendant company one of which was to the plaintiff in the sum of RM300,000.

[11] Notification of any charge with the SSM is required under s. 108(1) of the Companies Act 1965 which provides:

> Subject to this Division where a charge to which this section applies is created by a company, there shall be lodged with the Registrar for registration within thirty days after the creation of the charge a statement of the prescribed particulars, and if this section is not complied with in relation to the charge, the charge shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company.

[12] Again here is evidence that the first defendant recognises the loan and the charge in compliance with s. 108(1) of the Companies Act 1965. How did this charge come about? It was created following a debenture issued by the first defendant in favour of the plaintiff *vide* agreement dated 10 July 2008 (exh. P6) where the relevant part of the recital reads:

> A. The Chargor (1st Defendant) is in need of finance for the purposes its business operation and cash flow and has approached the Chargee (Plaintiff) requesting him to finance its requirements.
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> B. In consideration of the procurement by the Chargee [Plaintiff] of the financing of the business operation and cash flow for the sum of RINGGIT MALAYSIA THREE HUNDRED THOUSAND (RM300,000-00) ONLY the Chargor (1st Defendant) is entering into this Debenture by which the Chargor (1st Defendant) charge all its assets to secure payment of liabilities to the Chargee (Plaintiff) upon the terms and conditions herein contained.

[13] It is worth noting that the annual returns of the first defendant and the company charge as disclosed in the SSM search were its own statutory documents. The defendants cannot now be permitted to say the documents are erroneous without providing proof. The returns as they stand must be given the due weight considering these were prepared by the first defendant itself and were also documents required to be filed by law (see *Castle Inn Sdn Bhd v. Bumiputra-Commerce Bank Bhd* [2009] 2 CLJ 445).

[14] Considering the evidence in its entirety, the learned judge was entitled to come to a finding that the loan amount of RM300,000 was indeed given to the first defendant. The contention of there being no consideration is therefore without merit and cannot be sustained.

Validity Of Loan Agreement

[15] The second issue raised by the defendants in seeking to overturn the decision of the Sessions Court was premised on the contention that the said loan agreement entered into by the plaintiff and the first defendant was invalid. This contention was based on the ground that one of the directors who signed the said loan agreement (third defendant) was no longer a director of the first defendant at the material time and this was a violation of the first defendant's articles of association which articles applied the regulations in Table A in the Fourth Schedule to the Companies Act 1965. Regulation 96 in Table A states:

96. The directors shall provide for the safe custody of the seal, which shall only be used by the authority of the directors or of a committee of the directors authorised by the directors in that behalf, and every instrument to which the seal is affixed shall be signed by a director and shall be countersigned by the secretary or by a second director or by some other person appointed by the directors for the purpose.

[16] The defendants further argued that the said loan agreement was also invalid as there was no resolution by the board of directors of the first defendant to validate the loan and the agreement entered. The learned judge in this regard held that the agreement was valid because one of the directors had signed with the seal of the company and that the defendants in their pleading had admitted to the said loan agreement.

[17] Now although there may be some grounds for criticism of this reasoning and finding by the learned judge, what appears to have been overlooked is the application of the indoor management rule or the "rule in *Turquand'*s case" having its genesis in the case of *Royal British Bank v. Turquand* [1856] 119 ER 886. The essence of the rule is that persons dealing with a company in good faith are entitled to assume that acts within its constitution and powers have been properly and duly performed, and are not bound to enquire whether acts of internal management have been regular.

[18] The Federal Court in *Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors* [1998] 1 CLJ 793; [1998] 1 MLJ 465 observed that the "effect of the rule in *Turquand's* case is that it reduces the enquiries which outsiders having dealings with a company – or more correctly outsiders who reasonably think they are having dealings with a company – must make, which, of course promotes business convenience. Such outsiders have no right to insist on proof by the company's directors that the provisions of its memorandum or articles have been complied with, and they cannot therefore be deemed to have constructive notice of some failure to comply which they have no means of discovering" (per Edgar Joseph Jr FCJ at p. 826 (CLJ); p. 505 (MLJ)).

[19] One of the important exceptions to this rule is that it cannot be invoked by an outsider who knows or ought to know that there is an irregularity. As a corollary, this presumption of regularity of a company's affairs cannot apply if an outsider is put on inquiry if the circumstances are such that a reasonable person would suspect that something is wrongly done (see *Pekan Nenas, supra*; *Morris v. Kanssen & Ors* [1946] AC 459; *CB Liggett (Liverpool) Ltd v. Barclays Bank Ltd* [1928] 1 KB 48).

[20] Coming back to the instant case, it would not promote business convenience and certainty if an outsider like the plaintiff here had a duty to ascertain whether the first defendant company had passed a resolution to enter into the said loan agreement. Companies which later find difficulty in

keeping to the bargain may willy-nilly extricate themselves out of such arrangements by citing non-compliance with its internal procedures. In my view, the plaintiff is entitled to the benefit of the *Turquand* doctrine and the defendant's plea of invalidity of the said loan agreement in this regard cannot succeed.

[21] On the question of the director who had signed on behalf of the company after he had ceased to be a director, a close perusal of the documents tendered in the trial suggests a curious scenario. The company secretary of the first defendant (SD2) had testified that the third defendant had ceased to be a director on 22 June 2008 which is less than three weeks before the date of the loan agreement (10 July 2008). The third defendant was later re-appointed as director on 23 January 2009.

[22] I have noted that s. 127 of the Companies Act 1965 provides that acts of a director or manager or secretary shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification. This provision however is not helpful to the plaintiff as it must mean a case where there is a defect in the appointment and not a case where there has been no appointment or re-appointment or where the appointment has lapsed or as in this case where the director has resigned but continued to sign documents on behalf of the company (see *Morris v. Kanssen, supra*). An example of where s. 127 might be applicable would be a case of a bankrupt unknowing of his bankruptcy status signing documents on behalf of a company.

[23] Even so, I do think that considering the facts and circumstances in the present case, the plaintiff is entitled to the benefit of the *Turquand* rule. The evidence suggests that the plaintiff had acted in good faith and had no notice or no grounds to think that the said director was no longer a director and was acting without authority. The presence of the company seal and the signature of the other directors with authority only lend credence to the assertion that the first defendant had all along intended to be bound by the said loan arrangement and it is only now when they are facing legal action that this assertion of invalidity is being raised.

[24] The fact that the same director was later re-appointed director further suggests to me that the first defendant ought not to be allowed to take advantage of their own irregularities in running their company at the expense and detriment of the outsider plaintiff. It would have been a different matter if the said director had never been a director or had no connection with the company. The facts however show that at all material times the third defendant was a director except at the point of time when the said loan agreement was signed by him. For these reasons, the defendants' arguments on invalidity of the said loan agreement on this ground must also fail.

Conclusion

[25] It is trite that an appellate court will not ordinarily interfere with the findings and award of the trial court unless the award or findings were clearly wrong or erroneous; taking into account irrelevant matters and not considering relevant matters; or when the findings were clearly wrong in law and principle (*Bank Utama (Malaysia) Bhd v. Ihsan Budi Sdn Bhd* [2009] 1 CLJ 221).

[26] Considering the whole of the evidence and the submissions presented to the court, and for the reasons stated, I am unable to see how the decision of the learned Sessions Judge was wrong in law or principle or was erroneous such that it ought to be interfered with on appeal.

[27] For completeness, I should also state that I have not overlooked the defendants' claims that they could not have pleaded fraud or misrepresentation as they did not have all the documents in their possession. These claims are unpersuasive as after the claim was filed the defendants could have sought for discovery and then amend the pleadings accordingly. That they did not do so speaks volumes of the frailty of their assertions. In the upshot, the appeal was dismissed with costs fixed at RM10,000.